(17,822.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No 337.

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

ALPHONSE EMSHEIMER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 22, 1901.

a UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana, New Orleans Division.

ALPHONSE EMSHEIMER, Appellee,
versus
THE CITY OF NEW ORLEANS, Appellant. } No. 12830. In Equity.

Walter B. Sommerville, Esquire, and Branch K. Miller, Esquire, for appellant.
Rouse & Grant, Esquires, for appellee.

Appeal from the circuit court of the United States for the eastern district of Louisiana, New Orleans division, to the Supreme Court of the United States, returnable within thirty (30) days from the fifteenth (15th) day of June, A. D. 1900, at the city of Washington, District of Columbia.

Transcript of Appeal.

1 BILL AND EXHIBIT. Filed November 13th, 1899.

To the honorable the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, New Orleans division:

Alphonse Emsheimer, of New Orleans, an alien and a subject of the Empire of Germany, brings this his bill against the City of New Orleans, a municipal corporation created by the laws of Louisiana and a citizen of said State; and thereupon your orator complains and says:

1st. That by an act of the legislature of Louisiana (No. 74) approved September 14th, 1868, the parishes of Orleans, Jefferson, and St. Bernard were territorially united in one district for the purpose of police government therein, called the "Metropolitan Police district of New Orleans, State of Louisiana;" that the government of said district for police purposes was vested in a board of commissioners, styled "The board of Metropolitan police."

2nd. That said board was required to appoint all the officers and employés of the police force required in said district, and their salaries (which *was* prescribed by the act) were required to be paid monthly; that by said act and acts of said legislature supplementary to and amendatory thereof said board was required to make annually an estimate of the expenses of maintaining a police force in said district, and to apportion the same to the several cities and parishes within said district, and said cities and parishes were required by said acts to promptly pay and to provide the means for promptly paying the amounts thus apportioned to them.

3rd. That said City of New Orleans was a municipal corporation

created by the laws of said State of Louisiana, and was within
2 said Metropolitan Police district; that said board from and after its creation, as aforesaid, annually made the estimate of expenses of maintaining said Metropolitan police and apportioned the same to said several cities and parishes, as required by said acts.

4th. That the apportionments made by said board aforesaid to the city of New Orleans for all the years from 1869 to 1876, inclusively, amounted to the sum of $6,033,030.51, and when said apportionments were made and notified, as they were to said city, she became liable to said board of Metropolitan police for the amount thereof.

5th. That like apportionments of police expenses were made by said board to the cities of Jefferson and Carrollton, which were within said police district, for which apportionments they each became liable to said board, but afterwards, by acts of said legislature, said cities were consolidated with the city of New Orleans, which by said acts of consolidation was made liable for their debts, including those created for their apportionment of police expenses aforesaid.

Your orator has not sufficient information to state the amount of the liabilities thus created and imposed upon said city of New Orleans, but avers upon information and belief that it was sufficient to pay and discharge the proportion of police expenses due by each of said cities.

6th. That like apportionments were made by said board of police expenses to be paid by said parishes of Jefferson and St. Bernard and the city of Kenner, all within said police district, and notice given to each of said corporations thereof, as required by law, and thereupon they became and were absolutely liable to said board for the amount of their respective apportionments, but what the amounts of said apportionments were complainant is unable to state, but avers that they were sufficient to meet the annual police ex-
3 penses within their respective jurisdictions.

7th. That while said cities and parishes within the police district were required to promptly pay and to provide the means for promptly paying their respective apportionments, the councils of said cities and the police juries of said parishes were authorized to raise the amount required for that purpose by levying taxes upon the persons and things subject to taxation within their respective jurisdictions, and for that purpose did severally make such levies, and your orator avers that said city of New Orleans annually during the whole period of the existence of said board included in her budget of expenditures the amount thus apportioned to her and, in pursuance of said authority, levied and collected taxes for the purpose of paying the same and paid upon account thereof large sums of money, but not enough to discharge her liability in the premises, there still being due upon account thereof, including Carrollton, the sum of two hundred and forty-one thousand one hundred and six & $\frac{54}{100}$ dollars ($241,106.54), and the defendant, the present City of New Orleans, successor of said city as existing at the time said apportionments were made, is liable therefor.

8th. And your orator avers that said city of New Orleans was and is a statutory trustee of the money derived from such taxation and collected by her for the purpose of paying said apportionments of police expenses; that ever since said several levies of such taxes said city has been and still is making collections thereof and has collected large sums of money on account thereof, for which she has failed to account and still holds subject to said trust, the amount thereof being to your orator unknown; that for a portion of such collections a receiver was appointed by the civil district court for the parish of Orleans, with the consent of said city, to whom
4 said city, on July 25th, 1888, paid the sum of thirty thousand nine hundred and forty-four $\frac{94}{100}$ dollars ($30,944.94), part and parcel of the monies derived from the collection of such taxes, as well as other small sums thereafter, the amount and date of payment of which *is* to your orator unknown.

And your orator avers that afterwards, to wit, on the 27th of December, 1890, said receiver died, and that said board has been since then and is now without any successor or representative, and its affairs are under no administration whatsoever; that said city of New Orleans has since the death of said receiver continued to collect said police taxes and is still collecting the same, the amount of such collections being to your orator unknown, but he avers that it is a large amount, no part of which she has applied to the payment of any of her indebtedness on account of said apportionments, and that she holds the same subject to said trust, as above averred.

And your orator avers that large amounts of said police taxes levied as aforesaid became delinquent, and thereafter interest accured thereon at the rate of ten per cent. per annum; that said city of New Orleans collected large amounts of such interest, which, as accessory to said taxes, should have been paid to said police board, but which she neglected and refused, in violation of her duty as trustee, to apply to the payment of said apportionments, and she should be required to account for the same, with interest thereon; that the amount of police taxes, as well as the interest thereon, so as aforesaid collected is unknown to your orator, and he is entitled to an account thereof from said city before one of the masters of this honorable court or otherwise, as your honors may direct.

9th. That said board of Metropolitan police, in obedience to the laws creating and governing the same, organized a Metropol-
5 itan Police force in said district and maintained the same until March 31st, 1877, when said act No. 74, of September 14th, 1868, establishing said Metropolitan Police district, as well as all other acts amendatory thereof and upon the same subject-matter, were repealed, and said board of Metropolitan police was abolished without any provision being made for the liquidation of its affairs or the payment of its debts.

10th. That said board of Metropolitan police was a body corporate under the laws of its creation, and by the repeal of said law ceased to be and had and has no representative or successor against whom suit might have been or may now be brought for the establishment of the demands of the complainant herein, and he is re-

mediless except in this honorable court, where matters of this nature are cognizable and relievable; wherefore he brings this his bill in behalf of himself and all other creditors of said board similarly situated who may come in and contribute to the expense of this suit.

11th. That one Lew Goldstein, as holder of a large amount of Metropolitan Police warrants issued to officers and members of the Metropolitan police, and as assignee of sundry creditors of said board of Metropolitan police, on the 21st of October, 1886, brought suit in the 26th judicial district court in and for the parish of Jefferson, Louisiana, against said city of New Orleans, said city of Kenner, and said parishes of Jefferson and St. Bernard in behalf of himself and all other creditors of said board similarly situated, praying the appointment of a receiver and enforcement of the liabilities of said several defendants for the purpose of paying and discharging the obligations of said board; that citation was served on the 26th of October, 1886, upon each of said defendants to appear and answer in said suit, and afterwards said suit was removed into this honorable court, where holders of warrants and claims
6 against said board, amounting to a much larger sum, appeared before the master appointed by the order of the court and proved their demand, the claims now held by your orator being among those so presented and proved, as will appear by said master's report now on file, which is here referred to for greater certainty; that the case as against the city of New Orleans was afterwards dismissed upon the ground that this court had no acquired jurisdiction thereof, but as to all other defendants the same still remains pending and undisposed of.

That afterwards, to wit, February 9th, 1891, Henry W. Benjamin exhibited and filed his bill of complaint in this honorable court against said city of New Orleans and others for an account of the sums due by said defendants applicable to the payment of the certificates and claims against said police board held by him, being the same claims upon which said Goldstein brought suit, as aforesaid, and which said Benjamin has acquired; that various persons having like claims against said police board intervened in said suit and proved the same before the master therein; that among said claims sued upon by said Benjamin and said intervenors were included the obligations and claims since acquired and now held and owned by your orator, hereinafter enumerated and described; that process of subpœna in said case was duly served upon said city of New Orleans February 9th, 1891; that she afterwards appeared and answered, and a final decree was made against her in favor of said complainant and the intervenors therein establishing their claims and decreeing the said city to pay the same, which suit was afterwards dismissed for want of jurisdiction in this honorable court, but without prejudice to a new bill, which decree became final January 31st, 1898.

12th. That your orator is the holder and owner of certifi-
7 cates issued by said board of Metropolitan police in acknowledgement of its indebtedness for services rendered to it by the persons therein named and of transfers of debts due by said

police board amounting to three thousand thirty and $\frac{48}{100}$ dollars ($3,030.48), a list whereof is hereto annexed as Exhibit "A" and made a part of this bill; that said claims have been duly assigned and transferred to your orator for a valuable consideration, and he is now the holder and owner thereof.

And your orator avers that each of said persons in whose favor said claims accrued and to whom said certificates were issued or their heirs or legal representatives are citizens respectively of States other than Louisiana, and competent as such citizens to maintain suit in this honorable court against said defendant for the enforcement of said indebtedness represented by said certificates and transfers, if no assignment or transfer thereof had been made, the citizenship of said persons being as follows, viz:

Said D. M. Moore is a citizen of the State of New York.
" Eli Jones " " " " " " " Texas.
" Peter Joseph is a citizen of the State of Colorado.
" Robert Crofton is a citizen of the State of Mississippi.
" W. C. Bodechtel " " " " " " " California.
" J. H. Moore " " " " " " " Colorado.
" Edward Masterson " " " " " " " Ohio.
" John Dinan " " " " " " " "
" F. Coleman " " " " " " " "
" R. H. Taylor " " " " " " " Illinois.
" W. H. Murphy " " " " " " " Michigan.

Said G. H. Hammersley resided in and was a citizen of the State of California until he died, recently, leaving two sons, G. H. Hammersley and —— Hammersley, as his sole heirs, who are also citizens of the State of California.

8 Said Dr. J. B. Cooper resided in and was also a citizen of the State of California, where he died, leaving Mrs. Catherine E. Cooper, his widow, in community as sole heir under the laws of said State, of which she is a citizen.

15th. And your orator further shows and avers that there are now outstanding, due, and unpaid other warrants and certificates issued by said board of Metropolitan police, and sums due and owing by it for services rendered and supplies furnished thereto, amounting to a large sum, the exact amount thereof being unknown to your orator, but he avers upon information and belief that, including interest thereon, the amount exceeds two hundred thousand dollars ($200,000.00); that the only assets of said board of Metropolitan police at the time it was abolished were the amounts due to it by said city of New Orleans and by other municipal corporations within said police district; that the amount due by said city, as aforesaid, is applicable to the payment of the claims held and owned by your orator, as aforesaid, the same being for services rendered within said city, and that he is entitled to an accounting by said city in order that the amount due by her may be ascertained and fixed and decreed to be paid and applied to the payment of your orator's claims and of such others as shall join herein and contribute to the expense of this suit.

In consideration whereof, and inasmuch as your orator has not a

complete and adequate remedy at law, to the end, therefor-, that the said defendant may, if she can, show why your orator should not have the relief hereby prayed, and that she may full, true, and perfect answer make to all and singular the premises (but not under oath, the oath thereto being expressly waived); that an account be taken before a master to be appointed by the court of the amount of taxes collected by defendant on account of the assessment
9 and levies of taxes for police purposes, as set forth in the bill, and of the amounts due by the defendant on account of the apportionments aforesaid due by her, and that the defendant may be decreed to pay into the hands of a receiver the amount of said taxes collected, with interest thereon since the same have come into the hands of the defendant, and a sufficient amount of the said apportionments as trust funds to meet the demands of the complainant and other creditors similarly situated who may come into this cause and take the benefit of these proceedings and all expenses and costs, and that the same be applied to their payment—

May it please your honors to grant unto your orator a writ of subpœna, directed to said City of New Orleans, therein and thereby commanding her, on a day to be named and under a certain penalty therein specified, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to, abide, and perform such order and decree as to your honors shall seem meet.

And your orator prays such other and further and general relief as the nature of the circumstances of the case may require and as to equity and good conscience may be agreeable.

And your orator will ever pray, etc.

(Signed) J. D. ROUSE.
Solicitor for Complainant.

(Signed) WM. GRANT, *Of Counsel.*

EXHIBIT "A," Annexed to Bill of Alphonse Emsheimer.

List of Certificates of Indebtedness of Board of Metropolitan — and Claims against it Held and Owned by said Complainant.

10

Original payee.	Time.	Am't.
D. M. Moore	Nov., '74	71.23
Do.	Dec., '75	65.75
Do.	" '76	35.51
Eli Jones	Nov., '74	76.72
Do	Dec., '76	84.69
E. Jones	Dec., '74	30.13
Do.	" '75	82.19
Do.	Nov., '76	59.00
Peter Joseph	Dec., '74	152.87
Do.	Dec., '75	152.87
Robert Crofton	Oct., '74	118.90
Do.	Nov., '74	115.06

Do.	Dec.,	'74	118.90
Do.	"	'75	118.90
Do.	"	'76	118.57
Do.	Nov.,	'76	82.62
W. C. Bodechtel	Nov.,	'74	69.31
Do.	Dec.,	'74	70.95
Do.	"	'75	69.31
J. H. Moore	"	'76	127.04
Edward Masterson	Nov.,	'74	82.19
Do.	Dec.,	'76	84.69
R. H. Taylor	Nov.,	'74	68.50
Do.	Dec.,	'75	71.23
John Dinan	Dec.,	'74	84.93
Do.	"	'75	84.93
G. H. Hammersley	Nov.,	'74	84.38
Do.	Dec.,	'74	90.41
W. H. Murphy	Nov.,	'74	51.23
Do.	"	'74	30.13
Do.	Dec.,	'74	93.42
Do.			66.12
F. Coleman	Nov.,	'74	76.71
Do.	Dec.,	'74	71.23
Dr. J. B. Cooper	"	'75	169.86
			3,030.48

11 *Subpœna in Chancery. Issued November 13th, 1899.*

UNITED STATES OF AMERICA:

The President of the United States to the marshal for the eastern district of Louisiana, Greeting:

You are hereby commanded to summon The City of New Orleans to appear before the honorable the judges of the fifth judicial circuit of the United States of America at a circuit court to be holden on the first Monday of December, 1899, then and there to answer a bill in chancery filed against the city of New Orleans, wherein Alphonse Emsheimer is complainant and said City of New Orleans is defendant.

Herein fail not, and have you then and there this writ, with your endorsement thereon how you have executed the same.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 13th day of November, in the year of our Lord one thousand eight hundred and ninety-nine, and the 124 year of the American Independence.

[SEAL.] (Signed) E. R. HUNT, *Clerk*,
By H. J. CARTER, *D'y Clerk.*

The defendant is hereby notified that it is required to enter its appearance in the clerk's office of the United States circuit court on

or before the first Monday of December, 1899; otherwise the bill may be taken *pro confesso*.

(Signed) E. R. HUNT, *Clerk*,
By H. J. CARTER, *D'y Clerk*.

Marshal's Return. Filed November 13, 1899.

Received by U. S. marshal, New Orleans, La., Nov. 13, '99, and on the same day, month, and year I served copy hereof on the City of New Orleans by handing the same to Hon. W. C. Flower, mayor, in person, in the city of New Orleans, Louisiana.

(Signed) CHAS. FONTELIEU,
U. S. Marshal.

12 *Appearance of Defendant. Entered December 4th*, 1899.

Extract from Chancery Order Book.

MONDAY, *December 4th*, 1899.

ALPHONSE EMSHEIMER
vs.
CITY OF NEW ORLEANS. } No. 12830.

Now comes The City of New Orleans, defendant, through S. L. Gilmore, city att'y; W. B. Sommerville, ass't city att'y, and Branch K. Miller, solicitor, and enters its appearance to the complainant's bill of complaint herein.

13 *Demurrer. Filed December 30th*, 1899.

United States Circuit Court, Eastern District of Louisiana. In Equity.

ALPHONSE EMSHEIMER
vs.
CITY OF NEW ORLEANS. } No. 12830.

The demurrer of the City of New Orleans to the bill of complaint of Alphonse Emsheimer, the above-named plaintiff.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill and for cause of demurrer showeth:

First. That enough does not appear upon the face of the bill to show the court's jurisdiction of the suit in consequence of the want of proper, sufficient, and necessary averment of the citizenship of complainant's assignor or assignors of the warrants, certificates, claims, or choses in action upon which this suit is brought, nor does it sufficiently appear from the averments of complainant's said bill who were or are the assignors of the said warrants, certificates, claims,

or choses in action; that by the averments of complainant's said bill it is disclosed that this court is without jurisdiction of this suit by reason particularly of its failure to show, with sufficient clearness or to show at all, the citizenship at the date this suit was instituted of the parties from whom complainant acquired the said warrants, certificates, claims, or choses in action.

Second. That it appears by the said complainant's said bill that the parish of Jefferson and the parish of St. Bernard are necessary parties to said bill, inasmuch as it is herein stated that by
14 certain acts of the General Assembly of the State of Louisiana the annual estimate of expenses for maintaining a police force in the Metropolitan Police district were to be apportioned by the board of Metropolitan police to the city of New Orleans and the said two parishes, who were required by said statutes to provide the means for promptly paying the amounts thus apportioned to them, and inasmuch, further, that it is therein stated that there were made by the said parishes levies for taxes, to pay and discharge their said respective apportionments; that the said parishes and this defendant have mutually and reciprocally a common interest herein which the said bill affects.

Third. That said complainant has not in and by said bill made and stated such a cause as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

Fourth. That said plaintiff has not, as appears by his said bill, made out any title to the relief thereby prayed for; that the said bill presents no matter of equity, nor do its averments or any of them disclose any subject within the equity jurisdiction of this court; that if, in point of law and fact or either, complainant be entitled to any relief against this defendant, there is a plain, adequate, and complete remedy at law by which the same may be obtained.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant demurs thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with costs and charges in this behalf most wrongfully sustained.

(Signed) W. B. SOMMERVILLE,
BRANCH K. MILLER,
Solicitors for Defendant.

15 STATE OF LOUISIANA, }
Parish of Orleans. }

Personally appeared Walter C. Flower, mayor of the city of Orleans, who makes solemn oath and says that he is the mayor of the city of New Orleans, vested by law with authority to make this affidavit; that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

(Signed) W. C. FLOWER, *Mayor.*

BERNARD C. SHIELDS,
[SEAL.] *Not. Pub.*

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

(Signed) W. B. SOMMERVILLE,
BRANCH K. MILLER,
Solicitors for Defendant.

16 *Entering Demurrer Set Down for Argument.*

Extract from Chancery Order Book.

MONDAY, *January 1st*, 1900.

ALPHONSE EMSHEIMER
vs.
CITY OF NEW ORLEANS. } No. 12830.

And now comes Alphonse Emsheimer, complainant, by Rouse & Grant, his solicitors, and sets down the foregoing demurrer for argument.

Order Fixing Demurrer for Argument. Filed January 3, 1900.

United States Circuit Court, Eastern District of Louisiana.

ALPHONSE EMSHEIMER
vs.
CITY OF NEW ORLEANS. } No. 12830.

Upon motion of Rouse & Grant, solicitors for complainant, it is ordered that the defendant's demurrer in above-named case be fixed for argument on Saturday, January 6th, 1900, and that defendant's solicitors be notified.

Jan'y 6th, 1900.—Order case continued to Jan'y 13th, 1900.

Entering Hearing and Submission of Demurrer.

Extract from Minute Book, November Term, 1899.

17 NEW ORLEANS, SATURDAY, *January 13th*, 1900.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, district judge.

A. EMSHEIMER
vs.
CITY OF NEW ORLEANS. } No. 12830.

This cause came on to be heard upon the demurrer filed by the defendant—Branch K. Miller appearing for demurrer; Rouse & Grant for complainant—and was argued and submitted, when the court took time to consider.

Order Sustaining Demurrer, etc.

Extract from the Minutes, April Term, 1900.

NEW ORLEANS, FRIDAY, *May* 11, 1900.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

ALPHONSE EMSHEIMER *vs.* CITY OF NEW ORLEANS. } No. 12830.

This cause came on to be heard at a former day upon the demurrer to the bill filed by defendant and after arguments from counsel was submitted.

On consideration thereof, for the reasons on file, it is ordered that the defendant's first ground of demurrer be, and the same is hereby, overruled, the court finding and decreeing that the allegations of the citizenship of the complainant, of the original payees, and of the city of New Orleans is fully sufficient.

18 It is further ordered that defendant's third and fourth grounds of demurrer are hereby sustained, the court finding and decreeing that there is no equity in the bill of complaint herein, and said bill is therefore dismissed for want of equity with full reservation of complainant's right to sue and proceed at law.

Motion and Order of Appeal. Filed June 15, 1900.

United States Circuit Court, Eastern District of Louisiana.

ALPHONSE EMSHEIMER *vs.* CITY OF NEW ORLEANS. } No. 12830.

On motion of W. B. Sommerville and Branch K. Miller, solicitors for defendant, made in open court, and on suggesting that defendant is advised and believes that there is error to its prejudice in the final decree herein entered May 11th, 1900, during the present term of this court, in the respect only of the refusal of the court to maintain the first ground set up in defendant's demurrer to complainant's bill of complaint, which said ground of demurrer is as follows, to wit:

"That enough does not appear upon the face of the bill to show the court's jurisdiction of the suit in consequence of the want of proper, sufficient, and necessary averment of the citizenship of complainant's assignor or assignors of the warrants, certificates, claims, or choses in action upon which this suit is brought, nor does it sufficiently appear from the averments of complainant's said bill who were or are the assignors of the said warrants, certificates, claims,

or choses in action; that by the averments in complainant's
19 said bill it is disclosed that this court is without jurisdiction of this suit by reason particularly of its failure to show with sufficient clearness, or to show at all, the citizenship at the date this suit was instituted of the parties from whom complainant acquired the said warrants, certificates, claims, or choses in actions;"

And that defendant desires an appeal from the said decree, returnable to the Supreme Court of the United States, under and by virtue of paragraph one of section five of the act of Congress of March 3, 1891, for the purpose only of having a review of the finding, decision, and decree of the court overruling and refusing to maintain said first ground of said demurrer—

It is ordered that defendant, The City of New Orleans, be allowed an appeal under the said paragraph of the said section of the said act of Congress, returnable to the Supreme Court of the United States, at the city of Washington, District of Columbia, within thirty days from the entry of this order, the said appeal being granted for the sole and exclusive purpose of having a review of the finding, decision, and decree of the court overruling the said first ground of the said demurrer, by which the jurisdiction of this court and the sufficiency of the averments of the bill purporting to show the same are put at issue, upon said defendant furnishing bond, with surety, conditioned as the law directs, in the sum of one hundred dollars.

(Signed) CHAS. SWAYNE, *Judge.*

20 *Assignment of Errors. Filed June 15th*, 1900.

United States Circuit Court, Eastern District of Louisiana.

ALPHONSE EMSHEIMER *vs.* CITY OF NEW ORLEANS. } No. 12830.

Assignment of errors.

The City of New Orleans, respondent and defendant in this action, in connection with its motion for an appeal filed this day, makes the following assignment of errors which it avers occurred upon the trial of the cause:

That the court erred in overruling and refusing to maintain the first ground of demurrer filed herein by The City of New Orleans, defendant and respondent; which said ground of demurrer is as follows, to wit:

"That enough does not appear upon the face of the bill to show the court's jurisdiction of the suit in consequence of the want of proper, sufficient, and necessary averment of the citizenship of complainant's assignor or assignors of the warrants, certificates, claims, or choses in action upon which this suit is brought, nor does it sufficiently appear from the averments of complainant's said bill who were or are the assignors of the said warrants, certificates, claims, or choses in action; that by the averments of the complainant's said

bill it is disclosed that this court is without jurisdiction of this suit by reason particularly of its failure to show with sufficient clearness, or to show at all, the citizenship at the date this suit was instituted of the parties from whom complainant acquired the said warrants, certificates, claims, or choses in action."

That the court should have maintained such ground of demurrer and, for the reasons and causes therein set out, have dismissed
21 complainant's bill and not have overruled the same.

That the said circuit court is clearly without any jurisdiction to consider or entertain complainant's bill, as fully appears upon its face and by the averments thereof, relied upon to show the jurisdiction of the circuit court, upon the ground of diverse citizenship; that it is patent upon the face of said bill that the court is without jurisdiction by reason of the character of the parties or the citizenship thereof.

Wherefore the said defendant and appellant prays that the judgment of the circuit court be reversed in the respect that it maintains its jurisdiction of this cause upon the ground of diverse citizenship; that there be a review of the said judgment of said court upon this question alone, and that there be a reversal of the same upon the ground that the bill of complaint does not disclose a cause of which said court could take jurisdiction by reason of the diverse citizenship of the parties thereto, and such directions be given that full force and efficacy may inure to defendant by reason of the causes set up in the said first ground of its said demurrer filed in this cause.

(Signed) WALTER B. SOMMERVILLE,
BRANCH K. MILLER,
Solicitors for The City of New Orleans, Defendant.

Bond for Appeal. Filed June 15th, 1900.

UNITED STATES OF AMERICA:

Know all men by these presents that we, The City of New Orleans, as principal, and Robert M. Walmsley, as surety, are held and firmly bound, jointly and severally, unto Alphonse Emsheimer in
22 the sum of one hundred dollars, lawful money of the United States of America, to be paid to the said Alphonse Emsheimer, heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves and each of us by himself and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated the 15th day of June, in the year of our Lord nineteen hundred.

Whereas the said City of New Orleans having heretofore, to wit, on the 15th day of June, 1900, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 11th day of May, 1900, by the circuit court of the United States for the fifth circuit and eastern district of Louisiana, in the

suit of Alphonse Emsheimer *vs.* The City New Orleans, No. 12830 of the docket thereof:

Now, the condition of the above obligation is that if the above-bounden City of New Orleans shall prosecute its said appeal to effect and shall answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE CITY OF NEW ORLEANS,
(Signed) By PAUL CAPDEVILLE, *Mayor.*
" R. M. WALMSLEY.

Signed, sealed, and delivered in the presence of—
B. K. MILLER.
ARTHUR McGUIRK.

Taken and approved June 15th, 1900.
(Signed) CHAS. SWAYNE, *Judge.*

(Endorsed:) No. 12830. United States circuit court, district of Louisiana. Alphonse Emsheimer *vs.* City of New Orleans. Bond for appeal.

23 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 22 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of Alphonse Emsheimer *versus* The City of New Orleans, No. 12830 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 2 day of July, A. D. 1900.

{ Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La. }

E. R. HUNT, *Clerk.*

I, Charles Parlange, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 2 day of July, A. D, 1900.

CHARLES PARLANGE, *Judge.*

24 *Opinion and Order Dismissing Suit without Prejudice, &c. Filed May 11th, 1900.*

United States Circuit Court, Eastern District of Louisiana.

ALPHONSE EMSHEIMER
vs.
CITY OF NEW ORLEANS. } No. 12830.

Memorandum of reasons for dismissing the bill for want of equity.

The 1st ground of demurrer, as I understand it, is intended to set out the complaint that the citizenship of the immediate assignors of the complainant, and perhaps the citizenship of all the intermediate assignors, is not set out in the bill.

The bill shows that the citizenship of the city of New Orleans and that of the original payees of the warrants was diverse at the time the bill was filed. The bill also shows diverse citizenship as between the complainant and the city of New Orleans at the time the bill was filed. In my opinion that is sufficient to sustain the jurisdiction as regards citizenship in a suit on an assigned chose in action. I understand that all that is required in this respect is that at the time the suit is filed the citizenship of the original payee must be such as to have enabled him to sue, and that the citizenship of the party bringing the suit must also be such that he can maintain the suit, and I understand that in such a case as this the citizenship of intermediate holders of the chose in action is immaterial and need not be set out. When we consider what is the sole object of the provision that no suit can be brought on a chose in action unless such suit could have been brought if no assignment had been made (56 F. R., 627), it seems clear that Congress never intended that a chose in action could not be sued on in a Federal court unless every
25 person who at any time held the chose in action had the requisite citizenship to sue upon it.

Mr. Justice Grier, in Milledollar *vs.* Bell, 2 Wall., Jr., 334, decided very clearly the point here involved and held that the citizenship of intermediate assignees, holders, and endorsers is not to be considered. He approved Wilson *vs.* Fisher's Executors, 1 Baldwin, 133, to the same effect.

I have been cited to no authority, nor have I been able to discover any, which overrules or differs from Mr. Justice Grier's case just cited. In Mollan *vs.* Torrance, 9 Wheat., 537, and cases similar to it, it is held that an indorsee of a promissory note cannot sue a remote indorser without averring that an intermediate indorser, through whom he traces title, could have maintained the suit in the Federal court.

It is plain that the suit in such cases is not on the note, but on the contract of endorsement, and such authorities, while perfectly sound, do not apply to the case at bar.

I am therefore of opinion that the first ground of demurrer has no force and should be overruled.

The 3rd and 4th grounds of demurrer raise the question whether there is equity in the bill.

This cause is substantially the same as that brought by H. W. Benjamin against the city of New Orleans, and which was passed upon by the Supreme Court in 153 U. S., 411, after which decision Benjamin attempted to set out diverse citizenship by an amendment to his bill. After this amendment I dismissed the bill because he had not set out the State of which he claimed that the original assignors were citizens and also because there was no equity in the bill. 71 F. R., 758. The circuit court of appeals sustained my decision in dismissing the bill because the diverse citizenship had not been made to properly appear, but said that dismissing the bill also for want of equity was superfluous, since the circuit court had
26 no jurisdiction whatever of the parties. 74 F. R., 417. From this decision of the circuit court of appeals an appeal was taken by Benjamin to the Supreme Court, which court dismissed the appeal on the ground that the decision of the circuit court of appeals was final. 169 U. S., 161.

I have again carefully considered the opinion of the Supreme Court in New Orleans *vs.* Benjamin, 153 U. S., 411, and I am fully confirmed in my conviction that the Supreme Court had decided that that suit was not one of equity cognizance. It is perfectly plain to me that the complainant can bring a suit at law against the city of New Orleans, and that the abolition of the police board and "the act of 1877 left the city of New Orleans to respond as before to the credito-s, * * * and the remedies to which they could resort were quite as efficient as they ever had been." See specially page 429 of New Orleans *vs.* Benjamin, 153 U. S.

This is not a case where the assets of a dissolved corporation must, *ex necessitate*, be placed in the hands of a receiver. The Supreme Court, as I understand its opinion, shows that the act abolishing the police board was "essentially a mere change of an instrumentality of municipal government. It abolished the police organization established in 1868 and vested in the city the function of maintaining its own police. The legislation was not in contravention of the Constitution of the United States and was enacted in the exercise of the undisputed power of the State in that regard. In making the change no obligation rested on the State to create an independent and corporate successor of the board or to provide for the application of its assets to the payment of its debts, if existing laws were ample to effect that purpose. In that view the city of New Orleans remained for all purposes, so far as creditors were concerned, the representative of the board, and if the city were under a liability to pay the apportionments in cash it was not absolved from that
27 liability by the dissolution of the board." I do not see how plainer language could have been used by the Supreme Court to show that the creditors have their action at law against the city, notwithstanding the act of 1877, and that therefore no bill in equity will lie, except as an ancillary measure, after judgments at law have been obtained.

It is urged upon me that this court has, in Fisher *vs.* N. O.,

affirmed by the circuit court of appeals in 91 F. R., 574–582, allowed the relief which the complainant in this case asks for, but this contention is clearly erroneous.

In the Fisher case judgments at law were first obtained against the city, and the claim involved was for moneys actually collected, received, and retained by the city, which moneys should have gone towards the payment of the warrants held by the judgment creditors. To bring himself within the Fisher case the complainant in the cause at bar should first obtain judgments at law against the city, and, if he can show that the city had collected and retained moneys to which he is entitled as holder of the warrants he has sued upon, it would seem clear that he should have the same relief which was given Mrs. Fisher.

It should be specially noticed that the complainant in the cause at bar calls not only for an accounting of and a decree for taxes collected by the city on levies for police purposes, but also prays that the city be condemned to pay, with interest, the uncollected levies and assessments of such taxes which had been apportioned to the city. As to the claim for levies and assessments, it is perfectly clear to me from the opinion in Benjamin *vs.* N. O., 153 U. S., that the Supreme Court were of opinion that such a claim cannot be maintained.

It is well settled that a Federal court, after the repeal of a tax law, cannot reach, through a receiver, taxes levied, but not
28 collected. It is also well settled that taxes are not "debts" to which the creditors of a municipal corporation have a vested right.

Broughton *vs.* Pensacola, 93 U. S., 266; Merriwether *vs.* Garrett, 102 U. S., 472.

I am clearly of opinion that the bill must be dismissed for want of equity without prejudice to complainant's right to proceed at law.

Let the following order be entered:

It is ordered that the defendant's first ground of demurrer be, and the same is hereby, overruled, the court finding and decreeing that the allegation of the citizenship of the complainant, of the original payees, and of the city of New Orleans is fully sufficient.

It is further ordered that defendant's third and fourth grounds of demurrer are hereby sustained, the court finding and decreeing that there is no equity in the bill of complaint herein, and said bill is therefore dismissed for want of equity, with full reservation of complainant's right to sue and proceed at law.

(Signed) CHARLES PARLANGE,
U. S. Judge.

[Endorsed:] No. 12830. U. S. circuit court, eastern district of Louisiana. Alphonse Emsheimer *vs.* The City of New Orleans. Transcript of appeal.

Endorsed on cover: File No., 17,822. E. Louisiana C. C. U. S. Term No., 337. The City of New Orleans, appellant, *vs.* Alphonse Emsheimer. Filed July 6th, 1900.